NORTON BANKRUPTCY LAW ADVISER

Monthly Analysis of Important Issues and Recent Developments in Bankruptcy Law

Editor in Chief: Hon. William L. Norton, Jr., United States Bankruptcy Judge (1971-1985), Gainesville, Georgia
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July 2014 Issue 7

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BELLINGHAM: REASSURANCE CONCERNING BANKRUPTCY COURT JURISDICTION, BUT AT A PRICE

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In the much-anticipated *Bellingham* case,[1] commentators wrote, the Supreme Court could have "radically alter[ed] the bankruptcy system (and toss[ed] out the federal magistrate system to boot)."[2] This view found support in *Bellingham*'s petition for certiorari, which asked the Court to resolve two distinct circuit splits in ways that could have severely restricted bankruptcy court jurisdiction.[3] *Bellingham* also presented the Court with an opportunity to clarify the implications of its highly controversial decision in *Stern v. Marshall*, ____ U.S. ____, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), that held that Congress's grant of jurisdiction to bankruptcy courts to resolve all "core" bankruptcy matters as it defined them in 28 U.S.C.A. § 157(b) was too broad to comply with Article III of the United States Constitution. The *Stern* decision, the *Bellingham* certiorari petition pointed out, had caused "considerable confusion."

Instead of perpetrating a "radical alteration," the Supreme Court's *Bellingham* decision, unanimously issued on June 9,

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2014, conveys a message of peace. *Bellingham* makes clear that *Stern*'s restrictions on bankruptcy court jurisdiction will not go away, despite the consternation they have caused and the views of the four dissenting justices in *Stern*. *Bellingham* also makes clear, however, that *Stern* will not force drastic changes in bankruptcy practice.

Normally, *Bellingham* indicates, *Stern* will merely raise the standard of review for the bankruptcy court decisions to which it applies: In a *Stern* matter that is within bankruptcy courts' core jurisdiction under 28 U.S.C.A. § 157(b) but not under Article III of the Constitution, bankruptcy court decisions will simply be reviewed *de novo* instead of under the more generous clearly erroneous or abuse of discretion standards. Further, parties can resolve their jurisdictional problems in *Stern* matters simply by asking the bankruptcy court to "issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court,"[4] or perhaps, with the caveats discussed below, by consenting to bankruptcy courts' jurisdiction to enter final orders. Some federal district courts—including the courts in Delaware, the Northern District of Florida and the Southern District of New York—by local rule had already instructed bankruptcy courts to issue proposed findings and conclusions in *Stern* matters.[5]

The *Bellingham* Court's unanimous message of peace should be welcomed by bankruptcy courts, litigants and their counsel. The risk that rulings will be obtained in bankruptcy court only to be vacated for lack of jurisdiction has been significantly reduced. The Supreme Court's unanimity was purchased, however, at the price of side-stepping some of *Bellingham*'s thornier issues—one of which, as discussed below, the Supreme Court granted certiorari on July 1, 2014. As a result, at least until the Supreme Court's next decision, there is reason to doubt whether *Bellingham*'s implications for bankruptcy court litigation will prove to be quite as simple as the Court suggests.

Bellingham in the Lower Courts

The defendant in *Bellingham* was found liable on summary judgment for a fraudulent conveyance—the Chapter 7 trustee demonstrated, based on undisputed facts, that debtor "BIA" had somewhat brazenly transferred assets to defendant "EBIA" while insolvent. The district court reviewed the bankruptcy court's decision under the *de novo* standard that normally applies to review of summary judgments and affirmed. EBIA appealed to the United States Court of Appeals for the Ninth Circuit, but after EBIA filed its opening brief, the Supreme Court decided *Stern*. EBIA then moved to vacate the judgment below on the ground that the bankruptcy court had lacked jurisdiction to enter its final judgment, though the district court too had entered a final judgment.

The Ninth Circuit rejected EBIA's jurisdic-

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tional argument and affirmed the district court. Relying on *Stern* and *Granfinanciera, S.A. v. Nordberg*,[6] the circuit court began by deciding a "vexing constitutional issue" and it held that Article III of the Constitution does not allow bankruptcy courts to enter a final judgment on a state law fraudulent conveyance claim against a noncreditor absent consent. Further, although "[s]everal *amici*" had contended that the trustee's federal fraudulent transfer claim under 11 U.S.C.A. § 548 should be treated differently under *Stern* than his parallel state law claim, the court held that they were "wrong."[7]

Nevertheless, the Ninth Circuit affirmed. The court held that the bankruptcy court had statutory power to hear *Stern* claims and resolve them to the extent of issuing proposed findings of fact and conclusions of law. The Ninth Circuit recognized a "gap" in 28 U.S.C.A. § 157 in that bankruptcy courts are authorized to issue proposed findings under 28 U.S.C.A. § 157(b), which applies to core claims, but not under 28 U.S.C.A. § 157(c), which applies to noncore claims. The court also noted Seventh Circuit dicta suggesting that bankruptcy courts cannot issue proposed findings in a core matter, as well as Sixth Circuit dicta indicating that they can.

Given these conflicting precedents, the Ninth Circuit relied instead on a prior decision of its own. In *Duck v. Munn (In re Mankin)*,[8] the Ninth Circuit had concluded that Congress intended bankruptcy court powers to extend to the constitutional limit. Accordingly, because Article III prohibits bankruptcy courts from entering final judgments in *Stern* matters, but not from conducting other proceedings in those matters, the Ninth Circuit reasoned that bankruptcy courts retain the lesser power of issuing proposed findings of fact and conclusions of law.[9]

Oddly, the Ninth Circuit did not proceed to affirm the district court's decision, as it logically could have, on the ground that it had conducted a proper *de novo* review of the bankruptcy court's proposed findings and conclusions. Instead, the court affirmed on the ground of "implied consent." The court held that Article III's protections are "primarily personal, rather than structural,"[10] because a district court's referral of a matter to a court it supervises does not implicate separation-of-powers concerns.[11] The court concluded that the right to be heard by an Article III court is therefore waivable, noting that 28 U.S.C.A. § 157(c)(2) expressly permits bankruptcy courts to hear non-core matters beyond their jurisdiction if the parties consent.

In *Bellingham*, the Ninth Circuit further held, EBIA "impliedly" consented to the bankruptcy court's entry of final judgment because EBIA had petitioned the bankruptcy court to adjudicate the Chapter 7 trustee's summary judgment motion before ruling on whether the case should be heard by a district court. This was not a mere failure to object, the Ninth Circuit asserted, EBIA "affirmatively assented."[12] The court also noted that EBIA had "abandoned its motion to withdraw the reference" after summary judgment was rendered, and did not raise its constitutional objection again until after it had already filed its appellate brief.[13] Of course, *Stern* had not been decided when EBIA impliedly consented, but the Ninth Circuit maintained that EBIA could have studied the "lengthy perscrutation of the Article III question" in the Ninth Circuit's own decision in *Stern v. Marshall*.[14] Besides, the Ninth Circuit held, EBIA should not be permitted to "sandbag" the court by "assert[ing] a right it never thought to pursue when it still believed it might win."[15]

Turning to the merits, the Ninth Circuit found that the Chapter 7 trustee was indisputably entitled to summary judgment on his fraudulent conveyance claims because the debtor had transferred valuable assets to EBIA

for no consideration whatsoever. Significantly, however, the court specifically affirmed the district court's holding concerning the trustee's constructive fraud claim under the federal fraudulent transfer statute, 11 U.S.C.A. § 548(b)—a fact the Supreme Court never mentions—and only derivatively applied its holding to the trustee's parallel state law claim. The Ninth Circuit also affirmed the district court's additional holding that EBIA was a successor corporation of the debtor, rejecting EBIA's attempts to distinguish the two companies as "what Freud called the narcissism of minor differences."[16]

The Certiorari Petition and Supreme Court Decision

EBIA's petition for certiorari asked the Supreme Court to review the Ninth Circuit's decision because it conflicted with decisions in two other circuits and because, in the wake of *Stern*, "there is considerable confusion in the lower courts."[17] EBIA wrote:

> Applying *Stern*, . . . the Ninth Circuit held that a fraudulent conveyance action is subject to Article III. The court further held, in conflict with the Sixth Circuit, that the Article III problem had been waived by petitioner's litigation conduct, which the court of appeals construed as implied consent to entry of a final judgment by the bankruptcy court. The court of appeals also held, in conflict with the Seventh Circuit, that a bankruptcy court may issue proposed findings of fact and conclusions of law . . . in 'core' bankruptcy proceedings where Article III precludes the bankruptcy court from entering final judgment."[18]

Opposing certiorari, the Chapter 7 trustee conceded the conflict with the Seventh Circuit's conclusion that bankruptcy courts cannot issue proposed findings in core matters, but he contended that the proposed findings were merely a "constitutionally irrelevant first stop" on the way to a valid district court decision.[19] The trustee also contended that the Ninth Circuit's ruling that a party can consent to bankruptcy court jurisdiction was "irrelevant" and a "mere dictum pronouncement" even though, as noted above, the Ninth Circuit's ruling was actually based solely on its finding of "implied consent."[20]

The *Bellingham* decision indicates that the Court's concern to remedy lower court confusion about how to handle *Stern* matters, rather than any desire to resolve the circuit splits that EBIA had identified, led it to hear the case. The decision opens with a clear statement of its purpose and holding:

> In *Stern* . . . , this Court held that . . . Article III of the Constitution prohibits bankruptcy courts from finally adjudicating certain . . . claims. *Stern* did not, however, decide how bankruptcy or district courts should proceed when a '*Stern* claim' is identified. We hold today that when . . . the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court.[21]

The Court's reasoning was painfully simple. Because the parties did not contest whether the claim at issue was a *Stern* claim, the Court's sole concern was whether the courts below had handled it properly. The Court held that they did, ruling that 28 U.S.C.A. § 157 itself "closes the so-called 'gap' created by *Stern* claims" by providing that, when applying a provision of the statute would be "invalid," "the remainder of this Act, or the application of that provision to . . . circumstances other than those as to which it is held invalid, is not affected thereby." Accordingly, the Court explained:

> When a court identifies a claim as a *Stern* claim, it has necessarily "held invalid" the "application" of § 157(b)—*i.e.*, the "core" label and its attendant procedures—to the litigant's claim. . . . In that circumstance, the statute instructs that "the remainder of th[e] Act . . . is not affected thereby." That remainder includes § 157(c), which governs non-core proceedings. With the "core" category no longer

> available for the *Stern* claim at issue, we look to § 157(c)(1) to determine whether the claim may be adjudicated as a non-core claim—specifically, whether it is "not a core proceeding" but is "otherwise related to a case under title 11." If the claim satisfies the criteria of § 157(c)(1), the bankruptcy court simply treats the claims as non-core: The bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment.[22]

In this way, the Court notes, it fulfilled its promise that *Stern* " 'would not meaningfully chang[e] the division of labor in the current statute.' "[23] The Court also was able to affirm the Ninth Circuit's decision because the district court had followed proper procedure, which enabled the Court to avoid deciding the comparatively complex issue of implied consent.

Implications and Open Issues

The Supreme Court's simple prescription for adjudicating *Stern* claims, already adopted by local rule in Delaware, the Northern District of Florida and the Southern District of New York, is welcome. It does change the "division of labor" between district and bankruptcy courts by requiring *de novo* instead of deferential review of bankruptcy court determinations of fact, but that difference is arguably small, and the *de novo* standard already applies to review of legal questions and appeals from summary judgment. Further, though one may question the Supreme Court's logic in reasoning that "non-core" under Article III equals "non-core" under 28 U.S.C.A. § 157(c) even though the statute says otherwise, this quibble is unlikely to yield practical implications.

Nevertheless, for at least two reasons, the consequences of *Bellingham*, and of *Stern* after *Bellingham*, are likely to be much more complex than the Court suggests. First, the Court left open the question whether *Stern* applies to federal law claims by "assuming without deciding" that the trustee's claim was truly a *Stern* claim. The trustee's federal fraudulent transfer claim under 11 U.S.C.A. § 548 was at the heart of *Bellingham*: "several amici" contended that *Stern* did not apply to that claim, and the Ninth Circuit discussed the issue at some length.[24] Indeed, if the Supreme Court had ruled that bankruptcy courts have jurisdiction to enter final judgments when adjudicating federal fraudulent transfer claims, it could have disposed of *Bellingham* on that ground alone. In addition, *Bellingham* offers some support for the view that *Stern* does not apply to federal claims: it notes that *Stern* concerned a "common law" claim, and it explains which "private rights" may not be "removed from the jurisdiction of Article III courts" based on the distinction between "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power" and "the adjudication of *state-created* private rights."[25] Yet surprisingly, the Supreme Court decided *Bellingham* as if no federal rights were at issue: The Court never mentions 11 U.S.C.A. § 548, and it describes the trustee's claim as only a state law claim asserted under 11 U.S.C.A. § 544.[26]

The *Bellingham* Court's failure to rule on whether *Stern* applies to federal claims has important implications for counsel litigating those claims. After *Bellingham*, if a district court determines to treat federal fraudulent transfer claims as *Stern* claims, it will review bankruptcy court decisions *de novo*. If not, it will apply a more deferential standard. Consequently, even after *Bellingham*, parties will retain the right to challenge district court rulings under *Stern* if: (1) the district court concludes that *Stern* does not apply to federal claims, conducts a deferential review, and affirms, or (2) the district court concludes that *Stern* does apply to federal claims, conducts a *de novo* review, and reverses. In the former circumstance, the losing party may contend that the district court's review was too deferen-

tial to comply with Article III because *Stern* applies to federal claims; in the latter circumstance, the party may argue that *Stern* does not apply to federal claims and that the district court's review was therefore not deferential enough.

Given that *Bellingham* did not address whether the trustee's federal claim was a *Stern* claim, and that there were four dissenting justices in *Stern* who may be inclined to limit *Stern*'s scope, counsel should be careful to preserve their challenges to the standard of review on appeal. Further, although a challenge based on a district court's unduly deferential review of a bankruptcy court decision may be viewed as a jurisdictional objection and therefore non-waivable, a challenge based on an insufficiently deferential review would not be based on an asserted lack of jurisdiction and most likely can be waived.

Counsel may also face a complex decision after *Bellingham* concerning whether to forego pleading state law fraudulent conveyance claims in parallel to federal fraudulent transfer claims. Traditionally, debtors and trustees have pleaded both, and some state laws are more favorable to plaintiffs than federal law. Yet if a debtor would prefer that the bankruptcy court be given greater discretion in deciding the debtor's claims, it might plead only federal fraudulent transfer claims and argue that *Stern* does not apply. If the district court reviewing the bankruptcy court's decisions agrees, it will conduct the deferential review the debtor seeks. If the district court determines instead that *Stern* does apply to federal claims and proceeds to reverse after a *de novo* review, the debtor will at least have grounds for an appeal.

If the debtor were instead to plead both state and federal claims, in contrast, the reviewing court might allow its less deferential view of the state law issues to dictate its view of the federal law issues. A court would likely find it difficult to determine, for example, that witness A was more credible than witness B for purposes of the *de novo* review mandated by *Stern*, but that the bankruptcy court's contrary determination should be allowed to stand with respect to any parallel federal law claims that are reviewed only for "clear error." Consequently, *Bellingham* leaves counsel with some difficult decisions.

A second reason why *Bellingham*'s consequences may not be altogether peaceful is that the Court did not decide the issue that worried courts and commentators the most: Whether parties can consent to final adjudication by a bankruptcy judge (or a magistrate judge) without violating Article III. Even though *Bellingham* decided that *Stern* claims could be adjudicated under 28 U.S.C.A. § 157(c), it did not decide whether that statute's provision allowing for final adjudication of non-core matters when the parties consent is constitutional, let alone whether consent that is merely "implied" can suffice.

This consent issue is not likely to come up often in the bankruptcy context, because a party would have to challenge the validity of its own consent to raise it. Nevertheless, a party might argue that its consent was not knowing or voluntary, as might happen if a bankruptcy judge's relationship with an opposing party were not disclosed, or if the party's consent, as in *Bellingham*, was only implied rather than express.[27] Further, because the consent issue is an issue of federal subject matter jurisdiction, courts could raise it *sua sponte*.[28] And because the Supreme Court might ultimately determine that bankruptcy courts lack jurisdiction to enter final judgments upon consent despite Congress's authorization of this procedure in 11 U.S.C.A. § 157(c)(2), as the *Bellingham* certiorari petition put it, "every judgment entered by a bankruptcy court on the basis of litigant consent will be in doubt, subject to possible vacatur on appeal."[29]

Thus, given *Bellingham*'s silence, parties and their counsel must consider the risk of vacatur, and the resulting additional delays and expense, before consenting to bankruptcy court adjudication. A defendant may be eager to consent, because vacatur could provide an additional means of escaping liability, but plaintiffs and parties who are highly confident that they will prevail are likely to be less eager to do so until the constitutional issue has been decided. In addition, although a bankruptcy court's decision issued upon consent might be treated as proposed findings of fact and conclusions of law if the court was later held to lack jurisdiction, this is by no means certain even if the parties expressly consent to that treatment, as they should consider doing, in advance.

Bellingham's silence, therefore, is likely to deter parties from consenting to bankruptcy court adjudication, and it may ultimately have a significant effect on the division of labor between bankruptcy and district courts. The Supreme Court may resolve concerns about bankruptcy judges' jurisdiction to issue final judgments on consent relatively soon because it granted certiorari in *Wellness International Network Ltd. v. Sharif*,[30] on July 1, 2014, but pending that decision, uncertainties remain.[31]

The strategic considerations relevant to the decision whether to consent to bankruptcy court adjudication after *Bellingham* may also be important in deciding whether to consent to adjudication by magistrate judges. As noted above, commentators worried that *Bellingham* "could have toss[ed] out the federal magistrate system."[32] That concern was based on the fact that magistrate judges and bankruptcy judges are both non-Article III adjudicators who have been granted similar statutory authority to enter final judgments upon the consent of the parties.[33]

Further, the similarities between bankruptcy and magistrate judges were cited in *Bellingham* in the Petitioner's, Respondent's and Amici's briefs and discussed at length in oral argument before the Court.

Because *Bellingham* did not address the issue of consent, parties will face the same strategic decision whether to incur the risks that a magistrate judge's decision, upon appeal, may be vacated on jurisdictional grounds. The risk may be greater or less than the risk in consenting to bankruptcy court jurisdiction, however, depending on the court in which the consent issue is raised. Relevant decisions have already been issued by more than one circuit court[34] and, according to the Seventh Circuit but not all of the circuit courts, the Supreme Court itself in *Roell v. Withrow*,[35] "established that parties may consent to the entry of final decision by a magistrate judge under 28 U.S.C. § 636(c) . . . even though a magistrate judge lacks Article III tenure."[36]

Bellingham will not, then, bring universal peace to the turbulent world of bankruptcy court jurisdiction, and questions remain with respect to the powers of magistrate judges as well. Courts and parties clever enough to seek out technical statutory "gaps" will not be so easily mollified. *Bellingham* is, however, a step in the right direction. By telling bankruptcy and district courts not to panic, and that they can, in essence, keep doing as they have been doing, the Supreme Court made real progress toward refocusing attention away from procedural questions and back to where it should be: on the merits.

ENDNOTES:

[1]Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency), 134 S. Ct. 2165 (2014).

[2]Steven Lerner & Colter Paulson, Bellingham, CBA Report, at 7 (May 2014), available on the Internet at http://www.ssd.com/files/Publication/c74aa31a-25d6-4dfa-9e4c-a6f92c52fb39/Presentation/PublicationAttachment/93675f07-79ad-44b4-9858-a7817426c01a/In-re-Bellin

gham-Insurance-Agency.pdf ("Lerner and Paulson").

[3]See Petition for Certiorari, Executive Benefits Ins. Agency (EBIA) v. Arkinson (In re Bellingham Ins. Agency), No. 12-1200 (Apr. 3, 2013) (hereinafter cited as "Bellingham Cert. Petition").

[4]Bellingham, 134 S. Ct. at 2168.

[5]See In re Standing order of Reference Re: Title 11, No. 12-misc-00032 (S.D.N.Y. Jan. 31, 2012); In re Standing order of Reference Re: Title 11, (D. Del. Feb. 29, 2012); In re Bankruptcy Proceedings, Admin Order 2012-25, (S.D. Fla. Mar. 25, 2012).

[6]Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989).

[7]Executive Benefits Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553, 566-67 (9th Cir. 2012).

[8]Duck v. Munn (In re Mankin), 823 F.2d 1296, 1301 (9th Cir. 1987).

[9]Bellingham, 702 F.3d at 567.

[10]Bellingham, 702 F.3d at 560 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986)).

[11]Bellingham, 702 F.3d at 567 (discussing Schor, 478 U.S. at 848).

[12]Bellingham, 702 F.3d at 568.

[13]Bellingham, 702 F.3d at 568.

[14]Marshall v. Stern (In re Marshall), 600 F.3d 1037 (9th Cir. 2010).

[15]Bellingham, 702 F.3d at 570.

[16]Bellingham, 702 F.3d. at 572 (quoting Sigmund Freud, On Sexuality 272 (Penguin ed. 1991)).

[17]Bellingham Cert. Petition at 1.

[18]Bellingham Cert. Petition at 1.

[19]Brief in Opposition on Petition for Certiorari at 9, Executive Benefits Ins. Agency (EBIA) v. Arkinson (In re Bellingham Ins. Agency), No. 12-1200 (U.S. May 20, 2013) (hereinafter cited as "Bellingham Opposition").

[20]Bellingham Opposition at 5 & 8.

[21]Bellingham, 134 S. Ct. at 2168 & 2170.

[22]Bellingham, 134 S. Ct. at 2173 (internal citations omitted).

[23]Bellingham, 134 S. Ct. at 2173 n.8 (quoting Stern v. Marshall, ____ U.S. ____, 131 S. Ct. 2594, 2620, 180 L. Ed. 2d 475 (2011)).

[24]See Bellingham, 702 F.3d at 563-65.

[25]Bellingham, 134 S. Ct. at 2171 (emphasis added).

[26]Bellingham, 134 S. Ct. at 2169 n.1. The Court's decision to rule as if there were no federal claim in the case had a significant advantage from the point of view of justices who might have dissented in *Bellingham* if *Stern* were extended to federal fraudulent transfer claims: all of the Court's statements about constitutional restrictions on jurisdiction apply, with very little ambiguity, only to state law "fraudulent conveyance" claims.

[27]The issue of implied consent presented itself in an interesting way in *Wellness International Network Ltd. v. Sharif*, 376 F.3d 720 (7th Cir. 2013), because the question there was the extent to which a debtor impliedly consented to bankruptcy court adjudication of state law claims merely by filing its petition in bankruptcy court.

[28]See Peterson v. Somers Dublin Ltd., 729 F.3d 741, 746 (7th Cir. 2013).

[29]Bellingham Cert. Petition at 12. Although the Bellingham Opposition dismissed the Sixth Circuit's ruling that Article III concerns cannot be waived as "aberrational," that ruling is good law within its Circuit and may be followed in others.

[30]Wellness Int'l Network Ltd. v. Sharif, 376 F.3d 720 (2013).

[31]The Supreme Court granted certiorari in *Wellness* on the issue, "[w]hether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III." In *Wellness*, Richard Sharif brought suit against Wellness International Network, Ltd. ("Wellness") in federal district court in Texas, but was sanctioned by an award of $655,596.13 because he ignored Wellness's discovery requests. He then filed a bankruptcy petition, and Wellness objected to Sharif's discharge pursuant to 11 U.S.C.A. § 727. Wellness also alleged that a certain trust was Sharif's "alter ego and that its assets should therefore be treated as part of Sharif's bankruptcy estate." The bankruptcy court found for Wellness on all counts and its decision was affirmed by the district court. Wellness Int'l, 376 F.3d at 756-60.

The Seventh Circuit reversed on the ground

that the Bankruptcy Court lacked Constitutional authority to enter a ruling on Wellness's alter ego theory. It also rejected Wellness's argument that Sharif had waived his Article III rights by filing his bankruptcy petition, holding that, "a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceeding." Wellness Int'l, 376 F.3d at 773. Because the Seventh Circuit's *Wellness* decision was issued before Bellingham, the *Stern* claims at issue were classified as "core."

The grant of certiorari in *Wellness* gives the Supreme Court a second opportunity to address the most significant issue that it left unanswered in *Bellingham*—whether a party's consent can cure bankruptcy courts' Article III infirmity. The fact that certiorari was granted so soon after the release of *Bellingham* may well indicate that this is the Court's intention. However, the Court could avoid the consent issue yet again by ruling on other grounds, or might address the consent issue only to the extent of deciding the scope of *debtors'* implied consent when they file bankruptcy petitions—the precise issue raised by *Wellness*—and leave open the scope of consent by non-debtor litigants. Thus, yet another decision may well be necessary before the Court truly clarifies the jurisdictional consequences of parties' consent.

[32]See Lerner and Paulson, http://www.ssd.com/files/Publication/c74aa31a-25d6-4dfa-9e4c-a6f92c52fb39/Presentation/PublicationAttachment/93675f07-79ad-44b4-9858-a7817426c01a/In-re-Bellingham-Insurance-Agency.pdf.

[33]See 28 U.S.C.A. § 157(c)(2) (granting bankruptcy judges the power to enter judgment in non-core proceedings 'related to' bankruptcy upon parties' consent); 28 U.S.C.A. § 636(c) (granting magistrate judges the power to enter final judgments upon parties' consent).

[34]See Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 407 (5th Cir. 2012) ("Although the similarities between bankruptcy judges and magistrate judges suggest that the Court's analysis in *Stern* could be extended to this case, the plain fact is that our precedent in *Puryear* [upholding the power of magistrate judges to enter final judgment upon consent] is there, and the authority upon which it was based has not been overruled. Moreover, we are unwilling to say that *Stern* does that job *sub silentio*. . ."); Peterson v. Somers Dublin Ltd., 729 F.3d 741, 746 (7th Cir. 2013) ("It is established that parties may consent to the entry of final decision by a magistrate judge under 28 U.S.C. § 636(c), followed by an appeal that bypasses the district court, even though a magistrate judge lacks Article III tenure.").

[35]Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775 (2003).

[36]See Peterson v. Somers Dublin Ltd., 729 F.3d at 746-47.

CHAPTER 20 LIEN STRIPPING: ELEVENTH CIRCUIT UPDATE

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I. Background

Modification of a creditor's lien in bankruptcy is commonly known as "lien stripping." There are two varieties of lien stripping. A "strip-down" is when the secured portion of a lienholder's claim is reduced to the value of its interest in the collateral. A "strip-off" involves the complete removal of a creditor's lien—typically a junior lienholder—when the claim is wholly unsecured; because there is no value to secure the junior lienholder's claim, that lien is voided or "stripped-off." The United States Court of Appeals for the Eleventh Circuit recently in *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*,[1] joined the Fourth Circuit[2] in holding that a Chapter 13 debtor ineligible for discharge because of § 1328(f)[3] can nonetheless strip off a wholly unsecured junior lien on a principal residence.

In *Nobelman v. American Savings Bank*,[4] the Supreme Court held that the anti-modification clause of § 1322(b)(2) of the Bankruptcy Code prevents Chapter 13 debtors from stripping down the unsecured portion of an undersecured lien on the debtor's homestead. Thus, a Chapter 13 debtor may not strip down a creditor's claim when any portion of that claim is secured by the debtor's principal residence. While Chapter 13 debtors may not strip down partially secured homestead mortgages, *Nobel-*

